IN THE

United States Circuit Court of Appeals

18

FOR THE NINTH CIRCUIT

THE BRITISH STEAMSHIP "COOLGARDIE," Libellee, and H. A. THOMSON, Master and Claimant,
Appellants,

vs.

WILLIAM F. JAMES,
Appellee.

3294

BRIEF FOR APPELLEE

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GRANT H. SMITH,
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F. D. MONCKTON, Clerk.

By ....., Deputy Clerk.

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Appellee.

BRIEF OF APPELLEE UPON APPEAL BY APPELLANTS FROM THE UNITED STATES DISTRICT COURT IN AND FOR THE DISTRICT AND TERRITORY OF HAWAII.

I. STATEMENT OF THE CASE.

This appeal is from a judgment for damages, in the sum of $5,000 and costs, in favor of Dr. William F. James, appellee (libellant below), against The British Steamship "Coolgardie," libellee and appellant, for personal injuries sustained by Dr. James in boarding the vessel in the performance of his duty as a health officer; the trial court having found that the accident was due to the negligence of "The Coolgardie" in failing to use ordinary care to provide reasonably safe facilities for the boarding officers to get on deck. The

negligence consisted in failing to provide steps or some other reasonably safe means to descend to the deck from the top of a pile of lumber that was placed on the deck and along and against the bulwarks.

The facts are simple and undisputed, and are succinctly stated by the court in its opinion as follows: (Tr., p. 313):

> "The evidence shows that to board the vessel it was necessary to climb up a Jacob's ladder over the side, which, according to the evidence of the captain, was four feet and two inches above the deck, and get over the side onto a pile of lumber about a foot and a half below; and then get down from the pile of lumber to the deck, about two feet and nine inches below, by jumping, stepping or sliding down, as might occur to the person boarding to be least likely to cause injury."

Dr. James, the first of the boarding officers to climb to the ship's rail, stepped down some fifteen inches upon a mat, which had been placed upon the top of the lumber for that purpose; then stooped to jump to the deck. At that instant the mat slipped, precipitating him heavily to the deck upon one knee (Tr., pp. 40, 42, 54) whereby he sustained painful and probably permanent injuries. (Tr., pp. 230-232, 288-290.) That the mat slipped there is no doubt; witnesses Louis B. Reeves (Tr., 254) and Harry B. Brown (Tr., 269) and the doctor (Tr., 221) himself all testified that after the accident the mat was hanging over the edge of the lumber pile. All the other witnesses were unanimous in their testimony that before the accident the mat lay on the pile of lumber with its edge parallel with the sides of the lumber pile. The evidence shows that

the deck and the mat, and probably the lumber, were wet.

Captain Reeves, who followed Dr. James, put his hand down on the mat or on the lumber and jumped to the deck without injury. (Tr., p. 256.) Mr. Brown, the third boarding officer, jumped without touching his hands, also without injury. (Tr., pp. 268, 277.)

Doctor James had been boarding vessels at Honolulu for fifteen years (Tr., p. 234), and was a very active man. (Tr., pp. 258, 271, 290.)

In the opinion, the Court sums up its conclusions as follows (Tr., pp. 316, 317):

> "I conclude from the evidence that no provision whatever was made for the boarding officers to get from the lumber pile to the deck, and that the vessel was guilty of negligence in failing to make such provision. I am of opinion that the exercise of ordinary care would have provided something for them to step down upon from the lumber pile where they got off the Jacob's ladder."
>
> "It is insisted that libellant was guilty of negligence in jumping off the lumber pile, that he should have stopped or squatted down and placed his hands on the lumber and got off. Of course it ~~is easy~~ to think of many ways libellant could have got off without suffering injury. But the question is: Would an ordinarily prudent person have thought it unsafe to jump? I think the question must be answered in the negative."

Appellants in their brief make three points:

"(A) The accident was not caused by any negligence on the part of the vessel." (Appellants' Brief, p. 9.)

"(B) The negligence of the appellee in jumping from the lumber pile to the deck was the proximate

cause of the injury, and bars his recovery in this suit." (Appellants' Brief, p. 13.)

"(C) The Court erred in not holding and deciding that the libellant's negligence at least contributed to his injury, and therefore the damages should at least have been divided." (Appellants' Brief, p. 21.)

There is no contention on the part of appellants that the damages were excessive.

Appellants admit in their brief (p. 6):

"The evidence clearly shows that Dr. James (hereinafter called the appellee) was acting assistant surgeon in the public health service and visited the "Coolgardie" in his official capacity on the day of the accident. *In view of the foregoing facts, it is admitted that the "Coolgardie" owed him the duty of providing a reasonably safe means of getting aboard the vessel."*

And the whole tenor of appellants' brief is a virtual admission that they did not provide a safe way to get to the deck from the top of the lumber, coupled with the claim that Dr. James was guilty of negligence in attempting to jump to the deck. The case, therefore, resolves itself into a simple proposition of fact, which the trial court, in its opinion (Tr., p. 317), puts thus: "But the question is: Would an ordinarily prudent person have thought it unsafe to jump?" Which the court answers: "I think the question must be answered in the negative."

II. ARGUMENT.

A. The Issues.

Appellee claims, and claimed below, that the vessel owed to him as a boarding officer a duty to provide

reasonable and safe facilities for getting aboard the vessel, that such means were not provided, and that thereby he suffered grievous injury and damage. (Appellant now admits the duty, in his brief, p. 6.)

In their answer, libellees alleged that the accident was due to the fact that libellant jumped to the deck, "instead of stepping onto said pile of lumber and thence to the deck" (a step of from two and one-half to three feet). (Tr., p. 25.) On the trial, their evidence was mainly directed to showing that there was a safe way to get to the deck by walking to the aft end of the lumber pile, which they maintained had been so arranged as to form steps, or to step down by means of iron bitts which stood at the aft end of the lumber; thus endeavoring to show that of two ways, one safe and one unsafe, the libellant chose the unsafe way. In their brief herein, the appellants have again shifted their ground and now rely wholly upon the defense that the doctor assumed the risk in getting down to the deck in the manner he did; saying that he might have gotten down "safely and easily, by first sitting down on the lumber, allowing the legs to hang over and then standing upon the deck, or assisting his descent by placing his hand upon the lumber, as Capt. Reeves, his witness, did". (Appellants' brief, p. 7.) Appellants overlook the patent fact that the doctor *might* have injured himself by adopting either of those methods of getting down from the top of the pile to the deck. The only safe plan would have been to sit on the wet lumber and call to the crew to bring some steps or boxes upon which he could descend. This would be so ridiculous under the circumstances

that appellants barely suggest it. The normal, active man would jump, particularly in the face of the crew standing by, and would do so with safety in ninety-nine cases out of a hundred. In other words, while it would not be dangerous for an active man like Dr. James to jump to the deck, there would be an element of danger in so doing.

Appellants' defense comes down to this: We provided a safe way to reach the deck, but, if it was not safe, it was so obviously dangerous to jump that appellee assumed any danger connected with the attempt.

The libel was so framed as to set forth as the negligent act relied upon the failure of the ship's officers to provide a proper way for the libellant to get on board, and the accident that occurred was fully described and accurately, as shown from the facts adduced at the trial. The court's decision in no way diverges from or goes outside of the pleadings.

B. Dr. James Acted With Reasonable Care.

When Dr. James came over to the side of the ship he did what any man of reasonable prudence and care would have done. As he came to the top of the rail he threw his leg over, stepped on the mat and stood up. The rail was about fifteen inches higher than the top of the lumber and was the only thing available to take hold of. The Doctor either had to get down from the lumber or stoop or sit down and hold to the rail. The mat, which had been placed upon the lumber for the boarding officers to step upon, in-

dicated the only way down, and he took it. The entire transaction was a matter of seconds.

Appellants now contend that the Doctor should have squatted down, placed his hand upon the lumber and assisted himself down. In the court below they insisted that he should have eased himself down or sat down and slid off. Why not go further and say that he should have rolled off or crawled off? That, however, is beside the point. The question is: "What would a reasonably prudent man using ordinary care have done?"

Mr. Brown, the Immigration Inspector, who boarded the vessel immediately after Dr. James, testified that he came up over the Jacob's ladder, put his leg over the rail, stepped upon the lumber, and then jumped to the deck, and that there was no other way visible, none near by. (Tr., 268.) Mr. Brown was a man who had had eleven years of experience boarding ships as an immigration inspector; he was a reasonable man, one of ordinary care and prudence, and he did the very thing that the Doctor had done before him.

Captain Reeves, U. S. A., boarding officer, U. S. Customs, Honolulu, who had been boarding officer for five years, followed Dr. James over the side of the ship and jumped to the deck, at the same time putting his hand on the mat or on the lumber. (Tr., p. 256.) If, in so jumping, he had fallen on his knee and suffered grievous injury, would not appellant say that he had been negligent?

Had the ship provided some way to get to the deck, or even provided the usual means, which was a short

flight of steps, the accident would not have occurred. Mr. Brown testified (Tr., 274) that it is usual for "steamers" to provide a short flight of steps reaching from the rail to the deck. The evidence amply shows that there were a number of ship's officers and men standing about the deck where the doctor came over the rail; none of whom offered a hand or warned him, or indicated to him any different way of getting down than the way he used. Had one of these men given him a hand, the accident would not have occurred.

The evidence is without contradiction to the point that the doctor, prior to the accident, had been boarding vessels at Honolulu for fifteen years (Tr., p. 234), and was as agile and as well able to get around as any one. (Tr., 245-256-271-290.) The doctor was a man about 57 years old, lithe and active (Tr., pp. 258, 271, 290), weighing about 152 pounds, standing about five feet six inches (Tr., 235); a man of that kind does not get down and crawl off a pile of lumber two and a half to three feet high, when all the ship's crew is standing about waiting for him, expecting him to get down speedily and examine them. A reasonably prudent man, using ordinary care, would have done just what the doctor did. Would it have been reasonable to have refused to examine the crew or give practique until a flight of steps had been produced and put in place for use? What would the doctor have done in the meantime? Should he have remained standing there, with only a rail behind him, less than two feet high, until proper means to descend were provided, or should he have returned to Hono-

lulu? It must be remembered that the ship was in an open roadstead.

The court in its decision specially found that an ordinarily prudent person would not have thought it unsafe to jump. (Tr., 317.)

The testimony clearly shows that when the doctor stepped on the mat, it was parallel with the edge of the boards, with its side flush with the edge of the boards. That immediately after the accident the mat has hanging over the edge of the boards, clearly showing that it slipped with the doctor. The doctor himself testified that the mat slipped, precipitating him to the deck.

The testimony of the captain of the ship was, and we think it was conclusively established, that the mat was placed there for the express purpose of being stepped upon and being used as a place from which to get to the deck.

As previously stated by us, proctors for the libellee and claimant advanced below as their chief point the contention that the ship had provided another way to get down from the pile of lumber, and contended that the other way was safe. It is for the reason that this was relied upon so explicitly by the libellee and claimant (appellants here) that this matter was taken up by the Court below, and that the deciding of it formed so large a part of the Court's written decision. The appellants, however, now abandon this point, and enter into a discussion of the proximate cause and advance the contention that the doctor's act was the proximate cause. We think that if any discussion is entered into as to the proximate cause

or the nearest cause of the accident, forgetting the moving cause which we contend was the failure to provide a safe way, that the slipping of the mat caused the accident.

III. THE LAW.

Libellant's theory of the case, briefly stated, was as follows: That those in charge of the "Coolgardie" were bound to provide a safe way for the boarding officer to get on deck, that a safe way was not furnished, and that the ship was liable for damages resulting therefrom.

> "A a general rule, those in charge of a vessel are bound to exercise ordinary care to avoid injuring persons who are rightfully on or about the vessel by express or implied invitation, and hence the vessel and her owners are liable for injuries caused to persons, who are on the vessel by express or implied invitation, by reason of their negligence or that of the master or crew, as by dangerous or defective conditions or appliances; but they do not owe such duty to trespassers or mere licensees, as such persons enter upon the vessel at their own risk, and the vessel is bound to refrain only from wilfully and wantonly injuring them."
>
> "Where one has the right to use a ladder as a means of descent from the ship to the wharf, the vessel owes him a duty to see that it is properly secured, and, if personal injuries are caused by the negligence of the ship's crew in this regard, the vessel will be liable therefor."
>
> (Syl.) The Daylesford (D. C.), 30 Fed. 633.

There is no question but that the vessel would owe to Dr. James at least the degree of care it would owe to an invitee, although we submit it would owe a higher degree of care.

> "It is generally held that one who is on premises in the performance of a duty is there by implied invitation. This rule has been applied to employees of government, or municipality, but not to members of a public fire department who enter to protect the property from fire."
>
> 29 Cyc. 457.

And we respectfully call the Court's attention to the fact that the "Coolgardie" owed it to Dr. William F. James to use a higher degree of care than was ordinarily due a mere licensee. He was boarding the vessel in his official capacity, and in discharge of an official duty. The vessel could not have entered the harbor at Honolulu without Dr. James first examining and passing upon the health of the crew. The master and men should have exercised reasonable precautions for the safety of Dr. James while in the discharge of his duties.

> "The libellant (a U. S. Grain Inspector) was not on the vessel as a mere licensee. He was there in the discharge of an official duty in which the vessel itself had an interest, for it could not receive its cargo until it had been inspected. * * * It was the master's duty to prepare the vessel for inspection, and furnish what was necessary and proper for that purpose, and to exercise reasonable precaution for the safety of the libellant while in the discharge of his official duties."
>
> The City of Naples, 69 Fed. (C. C. A.) 794, 797.

"From the testimony in the case the court finds no difficulty in coming to the conclusion that the libellant was rightfully upon the dredge, with the knowledge of those in charge; that he was not there as a mere volunteer or licensee, but in the performance of his official duty. In this duty the dredge had an interest, for it could not proceed with its work without government inspection. The dredge then owed him the duty of prosecuting its work with reasonable skill, care and prudence to provide for his safety."

The Steam Dredge No. 1, 122 Fed. 679, 682.

"The owner or occupant of premises who induces others to come upon it by invitation express or implied, owes to them the duty of using reasonable or ordinary care to keep the premises in a safe and suitable condition, so that they will not be unnecessarily or unreasonably exposed to danger. And, hence such persons may recover for injuries received owing to the dangerous condition of the premises known to him and not to them. But a defendant is not bound to keep his premises absolutely safe."

29 Cyc. 453.

"ORDINARY CARE," "REASONABLE PRUDENCE."

Let us now see what would be the care required of those in charge of the vessel. We contend that they were negligent and did not use the amount of care required by law.

The leading case of *Grand Trunk Ry.* v. *Ives,* 144 U. S. 408, laid down the law, which has been generally followed, concerning "contributory negligence", "ordinary care", and "reasonable prudence", as follows:

"The terms 'ordinary care' and 'reasonable prudence', and such like terms, as applied to the conduct and affairs of men, have a relative significance and cannot be arbitrarily applied. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court."

"The question is, whether the plaintiff acted as a reasonable and prudent man should have acted and with the due care and caution demanded by the exigencies of the occasion."

"It is the duty of persons operating a street car to know that the place at which the car is stopped to allow a passenger to alight is reasonably safe, and the passenger has a right to assume that it is safe, unless it is obviously dangerous."

Mobile Light & R. Co. v. *Walsh,* 40 So. 559, 146 Ala. 290.

"Negligence is failure to exercise due care under the circumstances. What amounts to negligence under one set of circumstances cannot be proved by showing what amounts to due care under another set of circumstances."

Pau Kee v. *Wilder S. S. Co.,* 9 Haw. Rep. 57, 59.

"As in the case of the term 'negligence' definitions of ordinary care are numerous and varying. The following seems most apt: Ordinary care is that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances. The expressions 'due care', 'ordinary care' and 'reasonable care' are convertible terms."

29 Cyc. 427.

As to whether or not the mat was the final cause of the accident is immaterial. We submit that the direct

cause or proximate cause was the failure of those in charge of the vessel to provide a way to get down from that pile of lumber.

> "The proximate cause is not necessarily the nearest in time or place. It is the predominating, operative, efficient cause, which sets the others in motion."
>
> *Hawaii Land Co.* v. *Lion Fire Ins Co.,* 13 Haw. Rep. 167, 169.
>
> "Where there is an intermediate cause disconnected from the primary fault, such as an intervening human agency, 'self operating', which comes between the act of negligence and the injury, the negligence alleged is not the proximate cause of the injury unless a reasonable and prudent person should have foreseen that his negligent act would set the intervening cause or human agency in motion."
>
> *Ward* v. *Inter-Island S. N. Co.,* 22 Haw. Rep. 66, 71.

CONTRIBUTORY NEGLIGENCE IN MARINE CASES; EFFECT.

We respectfully submit that such evidence as claimant and libellee endeavored to adduce tending to show contributory negligence, was to be viewed by the Court in light of all the circumstances, and that even if contributory negligence was shown it was not a bar to recovery.

On the question of contributory negligence and divided damages in marine cases, the Supreme Court of the United States says:

> "Contributory negligence, in a case like the present, should not wholly bar recovery. There

would have been no injury to the libellant but for the fault of the vessel; and while, on the one hand, the court ought not to give him full compensation for his injury, where he himself was partly in fault, it ought not, on the other hand, to be restrained from saying that the fact of his negligence should not deprive him of all recovery of damages."

"The necessary conclusion is, that the question whether the libellant, upon the facts found, is entitled to a decree for divided damages, must be answered in the affirmative, in accordance with the judgment below. This being the only question certified, and the amount in dispute being insufficient to give this court jurisdiction of the whole case, our jurisdiction is limited to reviewing this question. *Chicago Union Bank* v. *Kansas City Bank,* 136 U. S. 223. Whether, in a case like this, the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the court, be for a greater or less proportion of such damages, is a question not presented for our determination upon this record, and we express no opinion upon it."

The Max Morris, 137 U. S. 1, 14.

In admiralty cases for damages for personal injuries, where there was contributory fault on the part of the libellant, it is no longer the rule that damages shall be divided equally.

"He did not exercise the care of a reasonably prudent man, under all the circumstances of the case. On a dimly lighted deck he cannot be held free from fault, in stooping down, going under a boom, and proceeding across hatch covers, without looking, and without paying any heed to his steps. The case, in my opinion, falls within the decision in *The Max Morris,* 137 U. S. 1, 11 Sup. Ct. 29, 34 L. ed. 586. There was fault on the part

of the barge. There was contributory fault, also, on the part of the libelant. In a case of personal injuries, although the damages are often divided equally, as in collision cases, the question of any other equitable division is now said to be open to the court. In The Max Morris the Supreme Court sustained the action of Judge Addison Brown in departing from the ordinary rule of dividing damages, although the court did not find it necessary to pass authoritatively on the question. Hughes on Admiralty, Sec. 116; Benedict's Admiralty (4th ed.), Sec. 233; *Pioneer S. S. Co.* v. *McCann,* 170 Fed. 873-880, 96 C. C. A. 49; *The Victory,* 68 Fed. 395, 400, 15 C. C. A. 490; *The Lackawanna* (D. C.), 151 Fed. 499-501; *The Serapis* (D. C.), 49 Fed. 393-397."

Conley v. *Consolidation Coastwise Co.,* 242 Fed. Rep. 591, 594, 595.

In the case of *The Granville R. Bacon,* 229 Fed. 715 (C. C. A., 5th Circuit), the following is the entire opinion:

"This is a libel in admiralty to recover damages from the Schooner Granville R. Bacon for injuries in unloading cargo. The decree of the District Court, without assigning specific reasons therefor, awarded $1,500 for damages.

"On the evidence in the transcript, we conclude that the schooner was guilty of negligence as charged, and that the libelant was guilty of contributory negligence. The evidence shows without dispute that the libelant was a young man 21 years of age at the time of his injury; that he was 50 days in bed and suffered pain, and was still suffering pain at the time of testifying; that the minimum fee of the attending physician was $350; that his leg was fractured at the hip, and has been shortened, so that he will be a cripple for life, and that, while he may be able to do light work,

he can never do the work to which he was accustomed; and that he had been a steady working man, hardly ever unemployed, generally earning $1.75 a day.

"From this we infer that the sum of $1,500, allowed by the District Judge, was based on the finding that, while the schooner was guilty of negligence, the libelant was guilty of contributory negligence, and that he followed the admiralty rule in such cases, dividing the damages. See *The Max Morris,* 137 U. S. 1, 11 Sup. Ct. 29, 34 L. ed. 586."

In *Carter* v. *Brown,* 212 Fed. 393, 396 (C. C. A., 5th Circuit), the court says:

"The District Judge allowed the appellee $1,000. As he also found that he was guilty of no contributory negligence, that sum must have been assessed by him as full compensation for appellee's injuries. The appellee complains by his cross-appeal of the insufficiency of the District Judge's award. Even though there was some concurring negligence shown upon the part of the appellee, we think, in view of the serious character of the injuries received by him and their probable effect on his present and future earning capacity, that the appellants have no cause of complaint, since the sum awarded would not be excessive, though the amount had been fixed upon the theory of divided damages. On the other hand, in view of the conflicting evidence as to appellee's concurring negligence, we do not feel disposed to increase the award at the appellee's instance."

The judgment of the District Court is affirmed upon both the direct and cross-appeal, and the appellants taxed with the costs of the appeal.

"In cases of marine tort courts of the admiralty are not bound by the common and civil law rules

governing cases of contributory negligence, but will, in the exercise of a sound discretion, give or withhold damages according to principles of equity and justice, considering all the circumstances of the case."

The Wanderer, 20 Fed. 140 (Circuit Court), 11 Wheat. 54; *The Explorer,* 20 Fed. Rep. 135; *The Wanderer,* 20 Fed. 140; *Atlee* v. *Packet Co.,* 21 Wall. 389.

Olson v. *Flavel,* 34 F. 477, 479 (D. C. for Oregon.)

The Daylesford, 30 Fed. 633.

The Max Morris, 137 U. S. 1.

The burden of proof was upon the party defending, and in matters not proven or left in doubt reasonable presumption should be in favor of the libellant.

"In the federal courts contributory negligence is a defense. The burden of proof is upon the defendant. Reasonable presumptions and inferences in respect to matters not proven or left in doubt should be in favor of the injured party."

Wabash Railroad Co. v. *Central Trust Co.* (C. C.), 23 Fed. 738;

The Steam Dredge No. 1, 122 Fed. 679, 687.

The Euxinia Case, 136 Fed. 502.

THE ELEMENTS OF DAMAGE.

As to the damages there can be little conflict in regard to the law. The judge could take into consideration all such elements as pain, suffering, loss of time, incapacity, permanency, character, nature and probable effects of the injury.

"Evidence of the conduct, general health, and physical condition of the plaintiff both before and after the infliction of an injury, or a comparison of one's health before and after such time is ad-

missible as tending to prove the extent, nature, and probable effects of the injury; provided of course a sufficient relationship is shown between the subsequent condition and the injury."

13 Cyc. 204.

And we submit that the findings of the Court as to facts, and especially in cases of conflicting evidence, are conclusive on appeal. And this although one judge heard the evidence and another decided it, upon a transcript as to part of the evidence.

4 C. J., 876-886.

APPELLANTS' CASES DISTINGUISHED.

Appellants cite a number of authorities to support their contention that the negligence of the appellee was the proximate cause of the injury; but it will be borne in mind that in negligence cases the decision depends upon a peculiar or particular set of facts, and we must look to those facts. Furthermore, the determining factor in cases of this character is the degree of care required of the injured person; whether absolute or ordinary. The test is: Was ordinary care used? And it is axiomatic that ordinary care is such care as ordinarily prudent persons would have exercised under like or similar circumstances to avoid danger.

In the case of the *Indiana Street Railway Co.* v. *Haverstick* (55 Ind. App. 281), Haverstick, the plaintiff, was standing on the running board of a crowded car. The poles along the track were close to the car, being about one foot away. The night was dark. In turning a corner, Haverstick was hurled against a pole

and injured. The railway company, of course, contended that Haverstick was guilty of contributory negligence. It was held by the Court:

> "An act done or the failure to act under such circumstances that a person of ordinary care, caution and prudence could not have apprehended danger therefrom is not an act or a failure to act in law as would amount to contributory negligence."

Haverstick could easily have avoided danger by walking instead of riding, by having refused to get on the car, or by forcing himself into the car, but that is not what an ordinarily prudent man would have done.

We have no particular quarrel with the law as laid down in the cases cited by appellants, but we do not think any of them apply.

Appellants appear to believe that they found a case upon all fours with the one at bar in "The Euxinia," 150 Fed. 541. In this, as in the other ships' cases cited, appellants overlook the fact that in each of those cases there was either a visible and apparent danger, or else a condition which indicated danger. In the case at bar, the danger was only a possible one.

"The Euxinia" case is similar to the case at bar in that a port quarantine physician was injured on a ship. Otherwise we see no similarity. The doctor, after boarding the ship, at night, went with the master to his cabin. As they passed an open coal hatch— and there was plenty of room to pass the hatch—the master warned the doctor of danger connected with the open hatch, and cautioned him to be careful. After the doctor left the cabin, he was again cautioned by the

master to look out for the open coal hatch. He passed the hatch with a friend, who was holding his arm, and who also warned him to look out for the hatch. After each warning, the doctor acknowledged the warning by such words as "That's all right"; "I see", and such like. The evidence showed that it was sufficiently light for any one who knew the position of the open hatch to pass it in safety, and the evidence showed that the open hatch could have been passed in a reasonable manner in safety. In passing the hatch the doctor deliberately stepped into it, falling to such a distance that he was killed. The stepping into it was unaccountable, as he was warned and at the very time the friend had hold of his arm.

There was no warning given to Dr. James. On the other hand, there was an indicated invitation to get down at the place and in the manner he did. We can see no similarity in the cases. The "Euxinia" case rests upon a state of facts absolutely opposite to the facts surrounding the "Coolgardie" case. In the "Euxinia" case, the doctor knew and appreciated the danger connected with the open hatch.

Thus the "Euxinia" case really is favorable to our contention. It clearly shows that if the obverse state of facts had existed, the ship would have been liable, that is, if the doctor had not known or appreciated the danger connected with passing the open hatch the ship would have been liable.

The appellants now contend that there was no danger connected with boarding the "Coolgardie" by the means provided, but that if there was any danger,

Dr. James assumed the risk, that he was himself responsible for the accident. *In other words, that there was no danger connected with boarding the ship which the ship's officers appreciated, but the danger was such that the doctor should have seen it;* a contention which we submit is impossible. In order to charge the doctor with contributory negligence, the danger must have been such that he appreciated it or the extent of it, or that a reasonably prudent person would have appreciated it or the extent of it; which fact we submit was not true.

> "Thus, one who vountarily assumes a position of danger the hazard of which he understands and appreciates cannot recover for resulting injury, unless there is some reason of necessity or propriety to justify him in so doing. If by the exercise of care proportionate to the danger one might reasonably expect to avoid the danger or if reasonably prudent men might differ as to the propriety of encountering it or where the way used is the only way, a recovery is not barred."
> 29 Cyc. 519.

DR. JAMES NOT REQUIRED TO MOVE ABOUT AT HIS PERIL.

In the case of *Low* v. *Grand Trunk Railway Co.*, 72 Me. 313, 39 Am. Rep. 331, the plaintiff, a customs officer, while searching for smugglers, fell through a gangway which was below the surface of the wharf and was unguarded. It was shown that such unguarded gangways were usual arrangements for the business had by the defendants, but it was held that this was not the question; that the defendant should have had reasonable regard for the safety of human beings

required to be in and about the premises, and should have guarded this gangway. The defendants also endeavored to show that the plaintiff was guilty of contributory negligence in that the night was light enough for him to have seen the unguarded gangway or if he could not have seen it he should have carried a lantern. The Court, however, held that the plaintiff was not obliged to move about at his own peril; that his duty carried him there and that the defendants owed a duty to this public officer to by precaution "have prevented him from being made a cripple."

That is what we contend in the present case. James was not obliged to move about at his own peril. He was a public official, whose duty required him to be upon the boat, and it was the duty of the boat to furnish him with a safe way to get on the boat.

> "An essential ingredient in any conception of negligence is that it involves the violation of the legal duty which one person owes another, the duty to take care of the safety of the person or property of the other."
>
> Thomas on Negligence, par. 3.

The appellant's duty was to take care of the safety of Dr. James. It failed in this duty by not providing a safe way for him to go on board the ship and it is guilty of negligence in not so doing. All other questions raised were subordinate to this main one.

This case is very similar to the case of *Young* v. *Gas and Electric Co.,* 128 Iowa 290. There the plaintiff, a mail carrier, was required to visit the car barn of defendant and collect mail from mail boxes

in the cars sheltered there. In going about this work he fell into an open pit and was injured. The Court said, on page 292:

> "It is sufficient to say the general obligation of the defendant to provide the mail carriers safe access to the cars which they were required to visit cannot well be disputed, while the testimony concerning the defendant's alleged acts of negligence and plaintiff's freedom from contributory negligence so far tended to sustain the allegations of the petition as to require their submission to the jury. Whether the pit was usually covered; whether the way taken by plaintiff was one which he had a right to use; whether there was another and safer way; whether any of the pathways were so incumbered by boxes, pails, tools or other obstructions that, as a reasonably prudent person, he was justified in seeking another route; whether the route taken was one which the mail carriers and defendant's employees ordinarily used in moving about the barn; whether the block with the protruding spike was so located as to be a source of danger to persons rightfully taking the path followed by the plaintiff, were all matters of more or less dispute at the trial. They involve familiar principles of law, and appear to have been fairly submitted to the jury. It is clear that, if the jury found against the defendant upon these questions, as it had the right to do, then the charge of negligence was established, and it was also for the jury to say whether this negligence was the proximate cause of plaintiff's injury, and whether he was or was not free from contributory negligence."

FAILURE TO PROVIDE STEPS: PARALLEL CASES.

Where a railroad car upon which a passenger was riding was stopped away from the station where there

was no platform, and the conductor called for passengers to get off, it was not contributory negligence for plaintiff to jump from the lowest step to the ground, a distance of two and one-half feet to three feet. "No stool was placed beside the steps to assist her. No offer from the conductor or any one was made to help her." The jury found that the plaintiff used "such care as a man of ordinary prudence and care would have used under the surrounding circumstances".

Brodie v. *Carolina Ry. Co.*, 24 S. E. Rep. 180, 185;
Ellis v. *Chicago M. & St. P. Ry.*, 98 N. W. 942.

In the following case, where the facts were the same as in the foregoing Brodie case, the Supreme Court of Wisconsin reached the same conclusion. The court says:

> "I am clearly of the opinion, however, that a railway company are not entitled to expose any passenger to the necessity of choosing between two alternatives, neither of which he could lawfully be called on to choose: namely, either to go on to Bangor, or to take his chance of danger and jump out; and if they do so, the choice is made at their peril. I agree that if it can be clearly seen by the passenger that the act must be attended with injury, it may then be fairly contended that he is not entitled to choose this obviously and certainly dangerous alternative. But what were the facts of the case? The distance to be descended was three feet, and a lady might very reasonably say she would encounter the risk. Nine out of ten might have done it with safety; but on the other hand, there was some danger, and such danger as the defendants were not entitled to expose her to. Although, if the danger were certain, as from a

pit or a stream of water lying below, a passenger who alighted in the face of that risk would be the author of his own evil; yet when he is called upon to choose between two evils to which the neglect of the company has exposed him, and one of which presents some degree of danger, but not such as he may not without imprudence encounter, if, in consequence of his adopting that alternative, he suffers any injury, that injury is the proper subject of an action against the company."

Delamatyr v. *Milwaukee Ry. Co.*, 24 Wis. 578, 586.

CONCLUSION.

The case simmers down to a very simple proposition: The Coolgardie" owed a duty to Dr. James to provide a safe way to board; it failed in its duty and because of this failure the Doctor was injured. Is the vessel liable? We submit that it is. And we further submit that little sympathy should be extended to one who commits a wrongful act and tries to throw the blame upon the party injured thereby.

We submit that the judgment of the lower Court should be sustained.

Dated at Honolulu, T. H., this 5th day of May, 1919.

Respectfully submitted,

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